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NG YEE HONG v. DISCIPLINARY COMMITTEE, MALAYSIAN INSTITUTE OF ACCOUNTANTS & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
WAN AHMAD FARID WAN SALLEH J
[JUDICIAL REVIEW NO: WA-25-446-10-2019]
11 MAY 2022

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Abstract – *Once a complaint for professional misconduct is registered against a professional, in this case, against an auditor to the Malaysian Institute of Accountants ('Institute'), and once the Investigation Committee ('IC') has deliberated and proposed charges against the applicant to the Disciplinary Committee ('DC'), the DC is not allowed to refer back to the IC for legal opinion or otherwise on matters to be decided exclusively by the DC. The DC has to decide 'independently and autonomously' and, by referring the matter back to IC, the DC had breached the procedural rules. The DC's decision was thus amenable to judicial review.*

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ADMINISTRATIVE LAW: *Judicial review – Application – Disciplinary proceedings pursuant to complaints against applicant – Validity of decision of Disciplinary Committee of Malaysian Institute of Accountants ('DC') – Whether issues in both complaints same – Whether final determination of one complaint rendered continuation of proceeding in second complaint invalid – Whether DC allowed to refer dismissal application back to investigation committee after IC framed charges against applicant – Whether DC's action tainted with procedural impropriety – Whether DC acted independently and autonomously*

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The issue which was the subject matter of this judicial review was related to the professional conduct of the applicant, a partner of Messrs Deloitte PLT, Chartered Accountants, as an auditor of 1Malaysia Development Berhad ('1MDB') for the financial years ending 2013 and 2014. Two complaints were lodged against the applicant by one Andre Anand Solomon ('Solomon') and Tony Pua, respectively, to the Registrar of the second respondent, the Malaysian Institute of Accountants ('Institute'). The complaints were registered as Complaint No. 23 and Complaint No. 25, respectively, before the first respondent, the Disciplinary Committee of the Institute ('DC'). The Investigation Committee ('IC'), appointed by the Council of the Institute, initiated investigations for both complaints. The IC then issued separate reports regarding each of the complaints and based on the two separate reports, the IC proposed three distinct charges to be proffered against the applicant on each complaint. The DC, after the hearing, found that the first and second allegations in Complaint No. 23 were proven. As a result of the findings, the applicant was suspended for two years and imposed a fine and

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was also ordered to pay costs and expenses incidental to the hearing. Aggrieved, the applicant appealed to the Disciplinary Appeal Board ('DAB') of the second respondent. The DAB confirmed the DC's decision and imposed further costs and expenses incidental to the deliberation of the DAB. The applicant subsequently commenced judicial review proceedings against the DAB decision in the High Court but the application was dismissed. With regard to Complaint No. 25, the DC dismissed the application to discontinue the disciplinary proceedings ('impugned decision'), *ie*, the DC agreed with the position of the IC that the two complaints concerned different subject areas and hence, the DC was of the opinion that they could only be determined through two separate hearings before the DC. Aggrieved by the impugned decision, the applicant filed this application for judicial review seeking, *inter alia*, for a declaration that by reason of the final determination of the DC in Complaint No. 23, the continuation of the disciplinary proceeding in Complaint No. 25 was invalid and unlawful. The applicant further sought an order of *certiorari* to quash the impugned decision and an order of *mandamus* to compel the DC to take necessary steps to dismiss the disciplinary proceedings in Complaint No. 25. The grounds for the application for judicial review were: (i) the impugned decision violated the doctrine of *res judicata* and was therefore illegal; (ii) the impugned decision was tainted with *Wednesbury*'s unreasonableness; (iii) the impugned decision was excessive and therefore disproportionate as it required the applicant to undergo substantive disciplinary proceedings for the same cause.

Held (issuing order of *certiorari*):

(1) The IC had served its purpose. It investigated Complaint No. 25 and prepared its report under r. 9(1)(b) of the Malaysian Institute of Accountants (Disciplinary) Rules 2002 ('MIA Rules'). There was nothing more for the IC to deliberate. The moment the IC proposed the charges in respect of Complaint No. 25, it became *functus officio*. (paras 42 & 48)

(2) The DC had referred the dismissal application to IC for its view. There was no procedural and legal need for the DC to revert to the IC on the dismissal application by the applicant. By referring the dismissal application to the IC, the DC failed to observe the procedural rules expressly laid down in the legislative instrument. In particular, the MIA Rules, by which the DC's jurisdiction is conferred, had been breached, even where such failure did not involve any denial of natural justice. There is nothing in the MIA Rules that allowed the DC to refer to the IC for a legal opinion or otherwise on the matter to be decided exclusively by the DC. By referring back the dismissal application to the IC, the DC's action was tainted with procedural impropriety and illegality. (paras 46, 49, 50, 52 & 55)

(3) Although leave was granted *ex parte*, the Institute did not file any appeal to the Court of Appeal under O. 53 r. 9 of the Rules of Court 2012. Failure to appeal would mean that one has accepted the correctness of the judge's decision in granting the leave. The attendant consequences would be, the Institute would be barred from raising the issue that the impugned decision was not amenable to judicial review. It had been conclusively determined. However, the attempt to circumvent a domestic remedy under r. 26 of the MIA Rules and s. 21 of the Accountants Act 1967 was not altogether fatal as the circumstances in this case fell within the ambit of an exceptional case that justified the appellant circumventing the appeal process to the DAB. (paras 57, 58 & 62)

Case(s) referred to:

Akira Sales & Services (M) Sdn Bhd v. Nadiah Zee Abdullah & Another Appeal [2018] 2 CLJ 513 FC ***(refd)***

Harley Development Inc And Another v. Commissioner of Inland Revenue [1996] 1 WLR 727 PC ***(refd)***

Ng Yee Hong v. Malaysian Institute Of Accountants [2021] 1 CLJ 666 CA ***(refd)***

Petroliam Nasional Bhd v. Nik Ramli Nik Hassan [2003] 4 CLJ 625 FC ***(refd)***

PP lwn. Nasrun Effendi [2009] 3 CLJ 388 HC ***(refd)***

R Rama Chandran v. Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Syed Omar Syed Mohamed v. Perbadanan Nasional Bhd [2012] 9 CLJ 557 FC ***(refd)***

Wong Keng Leong Rayney v. Law Society of Singapore [2006] 4 SLR 934 ***(refd)***

Legislation referred to:

Accountants Act 1967, ss. 3(1), 19(a), (b), 21

Malaysian Institute of Accountants (Disciplinary) Rules 2002, rr. 9(1)(b), 12, 26

Rules of Court 2012, O. 53 rr. 2(4), 9

For the applicant - Malik Imtiaz, Wong Min Yen & Khoo Suk Chyi; M/s Malik Imtiaz Sarwar

For the 1st respondent - John Mathew & Heng Yee Keat; M/s Christopher & Lee Ong

For the 2nd respondent - Shaarvin Raaj Selva Kumar; M/s Kumar Partnership

Reported by S Barathi

JUDGMENT

Wan Ahmad Farid Wan Salleh J:

[1] The applicant herein is a partner of Messrs Deloitte PLT, chartered accountants, whose address is at Menara LGB, Jalan Wan Kadir, Taman Tun Dr Ismail, Kuala Lumpur.

[2] The first respondent is the disciplinary committee ("DC") of the second respondent appointed under s. 19(b) of the Accountants Act 1967.

[3] The second respondent, the Malaysian Institute of Accountants ("Institute"), is a body corporate established under s. 3(1) of the Accountants Act.

[4] The issue which is the subject matter of this judicial review is related to the professional conduct of the applicant as auditor of 1Malaysia Development Berhad ("1MDB") for the financial years ending ("FYE") 2013 and 2014.

[5] On 31 March 2015 and 26 May 2015, there were two complaints lodged against the applicant by one Andre Anand Solomon ("Solomon") and Tony Pua, respectively, against the Registrar of the second respondent ("the Institute").

[6] The complaints were registered as DC-277-2017-23 ("Complaint No. 23") and DC-279-2017-25 ("Complaint No. 25"), respectively, before the DC.

The Allegations In Complaint No. 23

[7] The first allegation against the applicant made by Solomon in Complaint No. 23 pertained *inter alia* to the conduct of Deloitte PLT in obtaining sufficient audit evidence on the financial institution through which US$2.32 billion was invested in the Cayman Islands funds, notwithstanding a reported link to criminals.

[8] The second allegation made by Solomon concerned how Deloitte PLT failed to fulfil its obligation to report fraud. It is then contended that the applicant was negligent in failing to detect fraud based on the international standards of auditing ("ISA").

[9] In the complaint, Solomon also questioned the appropriateness of the use of the going concern assumption by Deloitte. The issue, according to Solomon, was whether Deloitte obtained sufficient evidence in making the aforesaid assumption.

The Allegations In Complaint No. 25

[10] As to Tony Pua, who is a member of Parliament, he took umbrage in the alleged negligence of Deloitte PLT in its failure to conduct sufficient and necessary due diligence and audit of 1MDB's level 3 assets, which included the investment in Cayman Islands funds. In short, both allegations are related to insufficient audit evidence on the Cayman Islands funds, which were part of the "available for sale investments" in the 1MDB balance sheet.

[11] The second key allegation against the applicant is that, based on the ISA, the applicant was negligent in failing to detect fraud or otherwise highly dubious and fraudulent transactions in 1MDB.

[12] Tony Pua also alleged that Deloitte PLT had failed to conduct sufficient and necessary due diligence in endorsing 1MDB as a going concern on 5 November 2015.

[13] In view of the related factual matrix in both Complaint No. 23 and Complaint No. 25, the applicant's position is that there is an overlap in both complaints.

The Investigation Stage

[14] The investigation committee ("IC"), appointed by the council of the Institute under s. 19(a) of the Accountants Act, then initiated the investigations for both complaints. The investigations were led by Lo See Yee ("LSY"), who was then the Senior Manager, Investigation Unit, Surveillance & Enforcement Division of the Institute.

[15] The applicant submitted written explanations in respect of Complaint No. 23 and Complaint No. 25 to the IC on 19 June 2015 and 7 July 2015, respectively.

[16] Over and above the submission of the written explanations, the applicant attended a hearing of both complaints in a single session on 30 March 2017.

[17] The IC then issued separate reports regarding each of the complaints on 28 September 2017.

[18] Based on the two separate reports, the IC proposed three distinct charges to be proffered against the applicant on each complaint. The charges can be summarised as follows:

Complaint No. 23

(i) Failure to obtain sufficient appropriate audit evidence that the financial institution in which IMDB's Cayman Islands funds were placed was a good credit rating.

(ii) Failure to comply with the requirements of ISA 240 pertaining to allegation (i) above.

(iii) Failure to obtain sufficient appropriate audit evidence that the use of going concern assumption was appropriate.

Complaint No. 25

(i) Failure to conduct sufficient and necessary due diligence and audit of the cash flow and liquidity risk of 1MDB in which the applicant had signed and endorsed 1MDB as a going concern on 5 November 2014. This was despite the company facing an imminent liquidity crisis.

(ii) Failure to conduct sufficient and necessary due diligence and audit of IMDB's "level 3" assets.

(iii) Failure to report the highly dubious and potentially fraudulent transactions in 1MDB to the relevant authorities in accordance with ISA 240.

The Disciplinary Committee Stage: Complaint No. 23

[19] On 19 December 2018, the DC ruled that the two complaints would be heard separately, though not necessarily one after another.

[20] As the hearing progressed, the applicant, through his counsel, was concerned whether the IC was permitted to raise matters that purportedly went beyond the complaints made by Solomon. For example, in his complaint, Solomon referred to the "financial institution" in which IMDB's Cayman Islands funds were placed.

[21] It became apparent later, as can be seen in his testimony, that Solomon was referring to BSI Bank Ltd, Singapore.

[22] Notwithstanding the assertion by the complainant that the financial institution meant BSI Bank, LSY, in his evidence before the DC said that the IC investigation was directed towards the segregated portfolio company ("SPC") fund. The line of argument of the applicant at the DC that can be distilled from the cross-examination of LSY is that, if it is not a financial institution, the applicant could not be accused of failing to do a credit rating search.

[23] This is so because the first allegation in respect of Complaint No. 23 is on the alleged failure of the applicant to obtain sufficient audit evidence that the financial institution in which the fund was placed was of good credit ratings as rated by international credit rating agencies. However, in so far as the IC is concerned, according to LSY, what is more important is not the rating but the credibility of the fund issuer itself.

[24] With that as a background, the DC ruled that the IC was permitted to raise matters that went beyond Complaint No. 23 made by Solomon.

Deferral Application

[25] While the proceedings on Complaint No. 23 were still ongoing, the DC sought to fix hearing dates for Complaint No. 25 made by Tony Pua. The applicant then solicitors sought the hearing of Complaint No. 25 to be deferred given the possible overlap between the two complaints.

[26] The deferral application was allowed by the DC.

The Decision Of The DC: Complaint No. 23

[27] The DC found that allegations (i) and (ii) of the Complaint No. 23 were proven.

[28] As a result of the findings, the applicant was suspended for two years and imposed a RM5,000 fine. The applicant was also ordered to pay costs and expenses incidental to the hearing for RM288,287.77.

The Appeal To The Disciplinary Appeal Board: Complaint No. 23

[29] Aggrieved by the decision of the DC, the applicant submitted an appeal to the Disciplinary Appeal Board ("DAB") of the second respondent.

[30] The DAB confirmed the decision of the DC and imposed further costs and expenses incidental to the deliberation of the DAB in the sum of RM80,250.55.

[31] On 8 February 2021, the applicant commenced judicial review proceedings against the DAB decision in Kuala Lumpur High Court No. WA-25-44-02-2021.

[32] On 9 December 2021, the High Court dismissed the applicant's judicial review application with costs.

Complaint No. 25

[33] The applicant's position has always been that the complaints in Complaint No. 23 and Complaint No. 25 are essentially the same. In the circumstances of the case, the final determination of Complaint No. 23 would attract the principle of *res judicata* in so far as the proceedings of Complaint No. 25 are concerned.

[34] For the aforesaid reason, the applicant wrote to the DC on 10 September 2019 for Complaint No. 25 to be dismissed.

[35] The IC argued that there were differences between the two complaints and opposed the applicant's dismissal application.

[36] By way of a letter dated 23 September 2019, the DC dismissed the application to discontinue the disciplinary proceedings in Complaint No. 25 ("the impugned decision"). In short, the DC agreed with the position of the IC that the two complaints concerned different subject areas. In view of the "different issues", the DC was of the opinion that they could only be determined through two separate hearings before the DC.

The Judicial Review

[37] Aggrieved by the impugned decision, the applicant filed this application for judicial review. In this application, the applicant seeks, *inter alia*, for a declaration that by reason of the final determination of the DC in Complaint No. 23, the continuation of the disciplinary proceeding in Complaint No. 25 is invalid and unlawful.

[38] The applicant further seeks the following order: A

(i) An order of *certiorari* to quash the impugned decision.

(ii) An order of *mandamus* to compel the DC to take the necessary steps to dismiss the disciplinary proceedings in Complaint No. 25.

[39] The grounds for the application for judicial review can be summarised B as follows:

(i) The impugned decision violates that doctrine of *res judicata* and is therefore illegal.

(ii) The impugned decision is tainted with *Wednesbury*'s unreasonableness. C

(iii) The impugned decision is excessive and therefore disproportionate as it requires the applicant to undergo substantive disciplinary proceedings for the same cause.

The Analysis D

[40] Let me begin by referring to the impugned letter. The relevant part of the impugned letter dated 23 September 2019 states as follows:

> We refer to the letter dated 10 September 2019 and attachments therein from the Respondent's legal counsel seeking the direction of the Disciplinary Committee ("the DC") to discontinue the above proceeding E and dismiss the Charge accordingly ("the Respondent's Application").
>
> The DC also refers to the reply letter dated 19 September 2019 and attachments therein from the Investigation Committee ("the IC") legal counsel to the Respondent's Application ("the IC's Reply").
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> Please be informed that after having considered and deliberated the F Respondent's Application and the IC's Reply, the DC has determined to dismiss the Respondent's Application and that the proceeding for NYH-2 [Complaint No. 25] to continue accordingly ...

[41] The DC then went on to give the reasons for the decision to dismiss the applicant's application. G

[42] It should be borne in mind that the moment the IC proposed the charges in respect of Complaint No. 25, which it referred to as the NYH-2 Charge, it became *functus officio*. My reason is this. Rule 9(1) of the Malaysian Institute of Accountants (Disciplinary) Rules 2002 ("the MIA H Rules") provides as follows:

> Where the Investigation Committee finds that there are sufficient grounds for disciplinary proceedings to be taken in respect of the member against whom the complaint was made, it shall be the duty of the Chairman of the Investigation Committee to:
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> (a) refer the complaint to the Disciplinary Committee; and

A (b) make a report of the investigation and state the findings of fact to the Disciplinary Committee.

[43] The IC had investigated Complaint No. 25 and determined that the matter be referred to the DC. In its report dated 28 September 2017, the IC had even framed the charges against the applicant, which was annexed as B exh. 6.

[44] Upon receipt of the report from the IC, the DC had acted under r. 12 of the MIA Rules and initiated the disciplinary hearing, which was later deferred pending the disposal of Complaint No. 23.

C **[45]** After Complaint No. 23 was disposed of, the applicant, through his then solicitors, wrote to the DC urging the DC to dismiss Complaint No. 25. Paragraph 4 of the said letter reads as follows:

> In view of the NYH-1 Decision [Complaint No. 23], it is our Client's position that the legal principle requiring finality (*res judicata*) applies and D that any further proceedings in respect of the conduct complained in NYH-1 would be an abuse of process. If NYH-2 were to proceed, the respondent would in effect have to be called upon to account for matters that he had already done so in NYH-1. The DC should keep in mind the nature of its role and function, and its jurisdiction.

E **[46]** As can be seen from the impugned letter, the DC had referred the dismissal application to IC for its view. Hence the opinion from the legal counsel acting for the IC.

[47] In *Ng Yee Hong v. Malaysian Institute Of Accountants* [2021] 1 CLJ 666 CA, the Court of Appeal made it clear that the three committees under the F Accountants Act are independent and autonomous from one another. Ravinthran Paramaguru JCA, in delivering the judgment of the court, remarked as follows:

> The elaborate statutory provisions speak to the independence and autonomy of the separate disciplinary committees.

G **[48]** Applying the law to the instant case, the IC had served its purpose. It had investigated Complaint No. 25. It had prepared its report under r. 9(1)(b) of the MIA Rules. It had even framed the charges to be proffered against the applicant in exh. 6 of the report. There is nothing more for the IC to deliberate.

H **[49]** By referring back the dismissal application to the IC, the DC's action is tainted with procedural impropriety and illegality. To begin with, the dismissal application was made to the DC. It was not made to the IC. The DC therefore has to decide, to use the phrase of the Court of Appeal, "independently and autonomously".

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[50] There is nothing in the MIA Rules that allows the DC to refer to the IC for a legal opinion or otherwise on the matter to be decided exclusively by the DC. It is irrelevant whether the DC acted upon the legal opinion proffered by the IC's solicitors or otherwise. The act of referring in itself is procedurally improper.

[51] In *PP lwn. Nasrun Effendi* [2009] 3 CLJ 388; [2008] 4 MLJ 272, Mohd Zawawi Salleh JC (now FCJ) referred to *Jowitt's Dictionary of English Law* (2nd edn, 1977), which defines *functus officio* as "having discharged his duty"; an expression applied to a judge, magistrate or arbitrator who has given a decision or made an order or award so that his authority is exhausted.

[52] In the instant case, the IC had discharged its duty by furnishing the report and framing the charge. The DC then acted upon it when it initiated the disciplinary hearing against the applicant. On the submission of the report, the IC's role is complete. It is, if I may say, done and dusted. There is no procedural and legal need for the DC to revert to the IC on the dismissal application by the applicant.

[53] It has been said, again and again, that the remedy of judicial review is not concerned with the merits of the impugned decision. Rather it is primarily a review of the decision-making process. A reviewing court may only scrutinise a decision on its merits "in the most appropriate case"; *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2003] 4 CLJ 625 FC.

[54] On the aforesaid authority, I am not going to address the merits of the impugned decision. I will only touch on the issue of procedural impropriety and illegality, which in my considered view, is sufficient to dispose of this application.

[55] By referring the dismissal application to the IC, the DC failed to observe the procedural rules expressly laid down in the legislative instrument. In particular, the MIA Rules by which the DC's jurisdiction is conferred have been breached, even where such failure does not involve any denial of natural justice; see *Akira Sales & Services (M) Sdn Bhd v. Nadiah Zee Abdullah & Another Appeal* [2018] 2 CLJ 513; [2018] 2 MLJ 537 FC.

Is It Necessary To Exhaust The Domestic Remedy?

[56] Learned counsel for the second respondent has attracted my attention that, on the assumption that the impugned decision is indeed a decision within the meaning of O. 53 r. 2(4) of the Rules of Court 2012 ("ROC"), the applicant should have exhausted the available domestic remedy by appealing to the DAB under r. 26 of the MIA Rules and s. 21 of the Accountants Act.

[57] To begin with, the leave to initiate this judicial review was granted on 7 October 2019. Although the leave was granted *ex parte*, the Institute did not file any appeal to the Court of Appeal under O. 53 r. 9 of the ROC. I believe

I state the law correctly in saying that failure to appeal would mean that one has accepted the correctness of the learned judge's decision in granting the leave; *Syed Omar Syed Mohamed v. Perbadanan Nasional Bhd* [2012] 9 CLJ 557; [2013] 1 MLJ 461 FC. The attendant consequences would be the Institute would be barred from raising the issue that the impugned decision is not amenable to judicial review. It has been conclusively determined.

[58] However, in the event that I am wrong in the aforesaid conclusion, the attempt to circumvent a domestic remedy is not altogether fatal.

[59] This issue was addressed by the Privy Council in *Harley Development Inc And Another v. Commissioner of Inland Revenue* [1996] 1 WLR 727 PC. In delivering the judgment of the board, Lord Jauncey of Tullichettle observed as follows:

> There are other *dicta* of high authority to the same effect. Their Lordships consider that, where a statute lays down a comprehensive system of appeals procedure against administrative decisions, it will only be in exceptional circumstances, typically an abuse of power, that the courts will entertain an application for judicial review of a decision which has not been appealed.

In *Wong Keng Leong Rayney v. Law Society of Singapore* [2006] 4 SLR 934, Rajah J (as he then was) was of the view that:

> However, there may be exceptional circumstances where the mechanical application of the concept of prematurity could result in irreparable harm to the applicant. In such exceptional cases, it would be remiss to deny the applicant the option of judicial review.

[60] Applying the said propositions to the facts of the case, can the applicant's situation be regarded as exceptional? From the impugned letter, the DC was adamant about continuing with the proceeding accordingly.

[61] The implication would be that the applicant would have to undergo the whole process all over again. He would have to give evidence on what he thought to be the same issues raised and determined in Complaint No. 23, of which he was found guilty, suspended and fined.

[62] In my considered view, the circumstances I narrated come within the ambit of an exceptional case that justifies the appellant circumventing the appeal process to the DAB.

Findings

[63] For the reasons I have alluded to earlier, the impugned decision is tainted with procedural impropriety, which made it amenable to judicial review. In making the impugned decision, the DC had failed to act in a manner that was both "independent and autonomous" within the context of the judgment of the Court of Appeal in *Ng Yee Hong*.

[64] The impugned decision is also invalid by reason of illegality in that the DC had failed to give effect to the law that regulates his decision-making power; see *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145 FC.

[65] For the aforesaid reasons, the impugned decision is tainted with procedural impropriety and illegality and an order of *certiorari* is hereby issued to quash the same.

[66] I am not making any order as to costs.